AO 120 (Rev. 08/10)

TO:	Mail Stop 8 Director of the U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK

In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court Southern District of New York on the following

☑ Trademarks or ☐ Patents. (☐ the patent action involves 35 U.S.C. § 292.):

DOCKET NO.	DATE FILED	U.S. DISTRICT COURT
16-cv-00958-ALC	2/9/2016	Southern District of New York

PLAINTIFF	DEFENDANT
Litmus Software, Inc.	Raintank, Inc.

	PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1	See Attached Sheet		See Attached Sheet
2			
3			
4			
5			

In the above—entitled case, the following patent(s)/ trademark(s) have been included:

DATE INCLUDED	INCLUDED BY ☐ Amendment ☐ Answer ☐ Cross Bill ☐ Other Pleading	
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 See Attached Sheet		See Attached Sheet
2		
3		
4		
5		

In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT
COPY ATTACHED:

CLERK	(BY) DEPUTY CLERK	DATE
Ruby J. Krajick	s/J. Kertes	5/25/2016

Copy 1—Upon initiation of action, mail this copy to Director Copy 3—Upon termination of action, mail this copy to Director
Copy 2—Upon filing document adding patent(s), mail this copy to Director Copy 4—Case file copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LITMUS SOFTWARE, INC., Plaintiff, v. RAINTANK, INC., Defendant.	16-cv-0958 NOTICE OF VOLUNTARY DISMISSAL WITH PREJUDICE

The Parties

Pursuant to Fed. R. Civ. P. 41(a)(1), Plaintiff hereby dismisses the instant action with prejudice.

Dated: May 24, 2016

Plaintiff Litmus Software, Inc.,
by its attorney,

Jeffrey Sonnabend
SonnabendLaw
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Brooklyn, NY 11215-6012
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LITMUS SOFTWARE, INC., Plaintiff, v. RAINTANK, INC., Defendant.	16-cv-0958 COMPLAINT Jury Trial Demanded

The Parties

1. Plaintiff, Litmus Software, Inc., is a Delaware corporation with an address of 675 Mass. Ave, Ste. 11, Cambridge, MA 02139.

2. Defendant, Raintank, Inc. is a Delaware Corporation with an address of 29 Broadway, New York, NY 10003.

Nature Of Action

3. The action is for trademark infringement under section 32 of the Lanham Act, 15 U.S.C. § 1114.

Jurisdiction And Venue

4. Subject matter jurisdiction is proper under 28 U.S.C. § 1331 and 1338.

5. Personal jurisdiction is proper under CPLR § 301

6. Venue is proper under 28 U.S.C. § 1391(b)(1).

Facts

7. Litmus Software, Inc. was established in 2009.

8. Litmus Software, Inc. provides software and services related to network testing, analysis and monitoring, including network email usability testing, analysis and monitoring. Litmus Software, Inc. has provided its software and services under the LITMUS mark openly and continuously since no later than 2007, directly and through its predecessor in interest.

9. Litmus Software, Inc. owns United States trademark registration no. 4,391,148 for the LITMUS mark for "email usability testing services; email delivery testing services; email analytic services; email filter testing; email previewing services, namely, services to analyze and determine proper rendering of emails in various email client software " in class 042. The registration claims a date of first use of the LITMUS mark of August 15, 2007 .

10. Raintank, Inc. is a corporation formed in October, 2014.

11. Raintank, Inc. provides "network performance monitoring" services and software under the mark "Litmus".

12. Raintank, Inc. first provided "network performance monitoring" services and software under the mark "Litmus" no earlier than May 2015. Upon information and belief, this use was, at least for the first several months, *de minimus*.

13. Litmus Software, Inc. became aware of Raintank, Inc.'s use of the LITMUS mark in or about November, 2015. Immediately upon learning of this use, Litmus Software, Inc. wrote to Raintank, Inc. and demanded that Raintank, Inc. cease and desist from use of the LITMUS mark and confusingly similar variations of it.

14. On January 19, 2016, counsel for Raintank, Inc. wrote to counsel for Litmus Software, Inc., refusing to cease and desist in any way from the use of the LITMUS mark. In its January 19, 2016 letter, Raintank, Inc. provided Litmus Software, Inc. with the former's

purported rationale for refusing to cease use of the LITMUS mark. Raintank, Inc.'s stated rational was in its entirety frivolous and baseless.

15. In the January 19, 2016 letter, Raintank, Inc. admitted that both parties use the LITMUS mark for network testing, monitoring and analysis related goods and services. Despite this admission, Raintank, Inc. stated that the parties' goods and services were sufficiently different so as to avoid likelihood of confusion between the parties and their marks. Raintank, Inc. made this allegation despite knowing of its falsity. Raintank, Inc.'s argument concerning the difference between the parties' goods and services is frivolous and baseless.

16. In the January 19, 2016 letter, Raintank, Inc. stated that the LITMUS mark is "descriptive in nature and has limited distinctiveness." Raintank, Inc. did not state the basis for this conclusion nor provide any explanation as to how the word "litmus" describes any characteristic or attribute of network testing, monitoring and analysis goods and services. Raintank, Inc.'s argument concerning the alleged descriptiveness of the LITMUS mark is frivolous and baseless.

17. In the January 19, 2016 letter, Raintank, Inc. stated that "Raintank began using the mark 'Litmus' in May of 2015," thus acknowledging that "litmus" is inherently distinctive and acts as a trademark for the parties' goods and services.

18. In the January 19, 2016 letter, Raintank, Inc. stated that "[t]he basis for a trademark infringement claim is consumer confusion." The basis for trademark infringement is, in fact, likelihood of confusion, and actual confusion need not be shown to prevail under the Lanham Act. Raintank, Inc. knew that it was misstating the test for trademark infringement, and its argument based on the incorrect standard is frivolous and baseless.

19. In the January 19, 2016 letter, Raintank, Inc. stated that the parties have been concurrently using the LITMUS mark "for over seven months." This alleged concurrent use formed in part the basis for Raintank, Inc.'s refusal to cease and desist from further infringement of the LITMUS mark. Raintank, Inc.'s argument concerning the alleged concurrent use of the LITMUS mark is frivolous and baseless.

20. In the January 19, 2016 letter, Raintank, Inc. stated that "The Registered [LITMUS] Mark is only eligible for minimal, if any, protection as shown by the number of marks similar to the Registered Mark. A search on the USPTO revealed that the term 'Litmus' is used in twenty one other marks. See Exhibit A."

21. The "twenty one other [LITMUS] marks" cited by Raintank, Inc. in the January 19, 2016 letter included: 12 canceled registrations; two registrations for clothing related goods and services (including safari wear); a registration for skin care products; several registrations for microbiology related services and equipment; a registration for the mark "Tornasol"; a registration for a poetry periodical; a registration for business consulting services; *and Litmus Software Inc.'s own registration.* Raintank, Inc.'s argument concerning the alleged "number of marks similar to the Registered Mark" is frivolous and baseless.

22. The January 19, 2016 letter was prepared and sent by an attorney who knew or should have known that the arguments contained therein were frivolous and baseless.

23. As evidenced by the frivolous and baseless arguments contained in the January 19, 2016 letter, Raintank, Inc.'s refusal to cease and desist from use of the LITMUS mark constitutes bad faith.

First Cause Of Action
Federal Trademark Infringement

24. Plaintiff repeats and realleges the above allegations as if stated fully herein.

25. Based on its registration and prior and ongoing use of the LITMUS mark, Litmus Software, Inc. has priority of use, ownership and rights in and to the LITMUS mark as to Raintank, Inc.

26. As a result of Raintank, Inc.'s unauthorized use of the LITMUS mark, there has been and continues to be a strong likelihood of confusion as to the source of the parties' services, and/or as to an affiliation between the parties or an endorsement by Litmus Software, Inc. of Raintank, Inc.

27. Raintank, Inc.'s use of the LITMUS mark constitutes trademark infringement under section 32 of the Lanham Act, 15 U.S.C. § 1114.

28. Plaintiff has been and continues to be harmed by Raintank, Inc.'s infringement.

Prayer For Relief

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor Plaintiff:

a. awarding damages to Plaintiff for Defendant's infringement pursuant to 15 U.S.C. § 1117(a);

b. awarding enhanced damages to Plaintiff of three times the amount of actual damages and profits pursuant to 15 U.S.C. § 1117(a);

c. awarding Plaintiff its costs and attorney's fees pursuant to 15 U.S.C. § 1117(a);

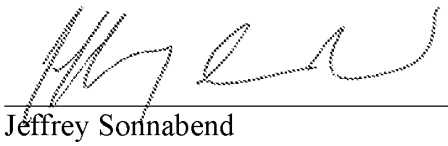
d. ordering the destruction of infringing articles pursuant to 15 U.S.C. § 1116(a);

e. permanently enjoining further infringement by Defendant pursuant to 15 U.S.C. § 1116(a); and

f. providing all other equitable relief that the Court deems just and proper.

Dated: February 9, 2016

Plaintiff Litmus Software, Inc.,
by its attorney,



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